FILED
JUN 19 [illegible]
JAMES R. BROWNING,

No. 936

# In the Supreme Court of the United States

OCTOBER TERM, 1958

BLUM VESTAL JOHNSON AND COMMIE ALLEN JOHNSON, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
*Solicitor General,*

MALCOLM R. WILKEY,
*Assistant Attorney General,*

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
*Attorneys,*
*Department of Justice,*
*Washington 25, D. C.*

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### OPINION BELOW

The opinion of the court of appeals (Pet. 9-11) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on April 8, 1959 (R. 41).[1] A petition for rehearing

[1] "R." refers to the record as filed in this Court; "Tr." to the transcript of the trial proceedings.

was denied on April 21, 1959 (R. 44). The petition for a writ of certiorari was filed on May 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in view of the fact that the judge gave a charge on aiding and abetting, the indictment was defective in failing to specify that petitioners were aiders and abettors.

2. Whether the evidence supports the verdict.

## STATUTE INVOLVED

18 U.S.C. 2 provides:

> Principals.
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

## STATEMENT

A four-count indictment charged the petitioners and two others with possessing an unregistered still, carrying on the distilling business without having given bond, making and fermenting mash for distillation on premises other than a duly authorized distillery, and possessing distilled spirits in containers which did not have the required stamps affixed in violation of 26 U.S.C. (Supp. V) 5008, 5216, 5601

and 5606 (R. 17-18). The two co-defendants pleaded guilty. Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioners were found guilty. Petitioner Blum Vestal Johnson was sentenced to serve a prison term of eighteen months; petitioner Commie Allen Johnson was sentenced to serve a prison term of fifteen months (R. 13). On appeal, the judgments were affirmed (R. 37-39, 41). The evidence may be summarized as follows:

At about 1:15 a.m. on July 11, 1958, six investigators for the Alcohol and Tobacco Tax Unit were searching for a reported unregistered distillery in the Windy Gap Section of Wilkes County, North Carolina (Tr. 4). They smelled an odor of fermented mash, could see lights in the woods and heard buckets being handled (Tr. 6).

At about 2 a.m., the investigators saw an old Chevrolet pick-up truck travel empty up Windy Gap Road in the direction of petitioner Commie Johnson's home (Tr. 7-8, 43, 64-66). Its light was seen to swerve near the driveway of Commie Johnson's home. About ten minutes later, the truck came down the road with a large square object in the back (Tr. 42-43, 45, 107). After passing the investigators, the truck stopped and there was a scraping noise as though something were being loaded or unloaded (Tr. 10, 45). Three flashlights, two with amber beams and one with a red reflector, were observed in the area where the truck had stopped (Tr. 10, 90). Three figures were observed carrying from the truck through a grassy field a large wooden box of the

type commonly used as a fermenter box at a distillery (Tr. 11-12, 38-39). The box was rolled down near a creek bank where a new fermenter box was later found on the creek bank directly opposite the still. Two of the men started back toward the truck, one carrying a red reflector flashlight (Tr. 12, 70, 111). The truck left with these two men, and the third man returned to the woods in the direction where the distillery was later discovered (Tr. 12, 70).

At the distillery, which was unregistered, Enoch and James Johnson (the defendants who pleaded guilty) were observed working—one dipping mash out of a bucket and the other pouring mash into the still (R. 23; Tr. 47). They fled when Investigator Carter announced himself as a federal officer but were subsequently arrested (Tr. 12, 48, 71). A later investigation along the side of the road near the still revealed four five-gallon jacketed cans of whiskey with no stamps affixed to the containers (Tr. 94).

At about 3:30 a.m., the Chevrolet truck and an Oldsmobile sedan, each occupied by one person, were observed on Windy Gap Road (Tr. 13-15, 92, 94, 113-114). The truck had a long board protruding from the rear (Tr. 17, 114). A few minutes later, the Oldsmobile came back down the road with two people inside (Tr. 15-16). A short time later, the investigators observed the Chevrolet truck on Commie Johnson's premises (Tr. 97, 98, 115). A residue of coal and coke was found in the back of the truck (Tr. 97, 98, 116). A long board, fourteen feet long and two to four feet wide with small pieces of wood

nailed to each end, was observed in the weeds and bushes near the truck (Tr. 98).[2]

Between 5:00 and 5:30 a.m. (Tr. 98), two investigators found petitioners asleep in the Oldsmobile (Tr. 99, 116) about a mile from the distillery (Tr. 120). Each had a flashlight near him, the flashlight nearest Blum Vestal Johnson being of the red reflector type (Tr. 99, 117). The trouser legs of each petitioner from about half-knee high down to their shoes were wet, and grass seeds similar to those on the trouser legs of the investigators who had been in the field near the still were on the trouser legs of the petitioners (Tr. 100, 117) or in their trouser cuffs (Tr. 72). There was an odor of mash (Tr. 99) and particles of mash were observed on the trousers of Commie Allen Johnson from about waist high down (Tr. 72, 99, 117). When asked if they would like to accompany the investigators to the distillery, petitioners declined and urged the investigators not to require them to go there (Tr. 118). In the trunk of the Oldsmobile, a residue of coke and coal and a little sugar were found (Tr. 117).

## ARGUMENT

1. Petitioners contend in this Court for the first time that, since they were not found at the distillery

[2] Special Investigator Lawson testified that a "take-off board" was often used to transfer liquor and other material to or from a distillery at a "take-off point" along the road in order to avoid leaving discernible signs along the side of the road (Tr. 94-95). Such a board was about fourteen to sixteen feet in length, sometimes with two other small pieces of wood nailed to it to prevent it from slipping (Tr. 95).

and the judge gave a charge on aiding and abetting, the indictment was defective in failing to charge that they were aiders and abettors and in failing to cite 18 U.S.C. 2, the statute which provides that aiders and abettors are liable as principals. It is well established, however, that, since aiders and abettors are liable as principals, the indictment need not specifically allege that the defendants are charged as aiders and abettors. *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 192; *O'Brien* v. *United States*, 25 F. 2d 90, 91 (C. A. 7); *Melling* v. *United States*, 25 F. 2d 92, 93 (C. A. 7); *United States* v. *Knickerbocker Fur Coat Co.*, 66 F. 2d 388 (C. A. 2). See *Nye & Nissen* v. *United States*, 168 F. 2d 846, 855 (C. A. 9), affirmed, 336 U.S. 613. And while the judge properly did charge on the subject, the evidence suggests that petitioners were principals, rather than aiders and abettors, in the criminal enterprise.

2. The attack on the sufficiency of the evidence is without merit. The circumstances summarized in the Statement, *supra*, fully justified the inference that petitioners participated, either as principals or as aiders and abettors, in carrying on the business of an unregistered distillery by bringing materials to the still, including the fermenter box, and using their vehicles in the operation. In *Bozza* v. *United States*, 330 U.S. 160, which petitioners cite, this Court held that, although the evidence did not disclose that the defendant there mixed mash or possessed the distillery, there was evidence that he helped the owner of the still and that he was, therefore, properly convicted of aiding the owner in carrying on the busi-

ness of a distiller. Since in this case the general sentence imposed on each of the petitioners is less that the maximum permitted on the count charging the carrying on of the business (see 26 U.S.C. (Supp. V) 5626), the conviction may properly be supported on that count alone.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*

MALCOM R. WILKEY,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
*Attorneys.*

JUNE 1959.

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